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**CIVIL ACTION NO.** \_\_\_\_\_

## JURY DEMANDED

## Defendants.

**TO THE HONORABLE JUDGE OF SAID COURT:**

**I.**  
**PARTIES**

1. Scott O'Grady is an individual resident of the State of Texas.
2. On information and belief, Fox is a Delaware corporation having a business address of 10201 West Pico Boulevard, Los Angeles, CA 90035. Defendant Fox has failed to designate and maintain a resident agent for service of process in the State of Texas. The Defendant may therefore be served with process by serving the Texas Secretary of State pursuant to Texas Civil Practice and Remedies Code, § 17.041, *et seq.* The Texas Secretary of State may

then serve the Defendant by forwarding a copy of the process to the Defendant's President, at the Defendant's principal place of business as set forth above.

3. On information and belief, Discovery is a Delaware corporation having a business address of 7700 Wisconsin Ave., Bethesda, MD 20814-3579. Defendant Discovery has failed to designate and maintain a resident agent for service of process in the State of Texas. The Defendant may therefore be served with process by serving the Texas Secretary of State pursuant to Texas Civil Practice and Remedies Code, § 17.041, *et seq.* The Texas Secretary of State may then serve the Defendant by forwarding a copy of the process to the Defendant's President at the Defendant's principal place of business and home office as set forth above.

## **II.**

### **JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 15 U.S.C. § 1121 as this is a civil action arising under the Lanham Act, 15 U.S.C. § 1051, *et seq.* This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 as there is complete diversity among the parties to this suit and as the amount in controversy exceeds \$75,000, exclusive of interest and costs. This Court has supplemental jurisdiction of claims arising under state law pursuant to 28 U.S.C. §§ 1338(b) and 1367.

5. This Court has personal jurisdiction over Defendants as Defendants regularly and systematically conduct business in Texas, and because Defendants' acts and omissions giving rise to the causes of action asserted herein occurred in Texas.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) as Defendants have committed acts and omissions giving rise to the causes of action asserted herein in this District, and because Defendants are subject to personal jurisdiction in this District.

### **III.** **FACTS**

#### **A. Captain Scott O'Grady – U.S. Air Force Fighter Pilot.**

7. Scott O'Grady (hereinafter referred to as "Captain O'Grady" or "O'Grady") served in the United States Air Force as a Captain and as an F-16 fighter pilot from 1991 to 1998. In 1994, Captain O'Grady was assigned to duty at the U.S. Air Force base near Aviano, Italy with the 555<sup>th</sup> Fighter Squadron.

8. During a military conflict sometimes referred to as the Bosnian war, the U.S. Air Force, as part of an international peace keeping effort, was charged with enforcing so-called "no-fly zones" over specified territories of Bosnia, an operation known as "Deny Flight".

9. Captain O'Grady's unit, based at Aviano, Italy, was part of the U.S. military force assigned to enforce the no-fly zone. Captain O'Grady flew numerous missions over Bosnian airspace in connection with those responsibilities.

#### **B. Shot Down Over Bosnia.**

10. On June 2, 1995, Captain O'Grady was briefed by his flight leader and the two F-16's left Aviano for a patrol over Bosnian airspace. His call sign for this flight was "Basher 52". Unknown to any U.S. forces, Serbian forces had moved surface to air missiles into the area of the patrol.

11. While flying high above the Bosnian war zone, suddenly, and with little warning, a Serbian surface to air missile hit Captain O'Grady's plane. The F-16 exploded around him in a ball of flames, forcing him to eject. He could see pieces of the F-16 flying around him as he cleared the burning wreckage. Captain O'Grady had been traveling approximately 500 miles per hour (true airspeed) when he ejected and was nearly five miles above the earth. His flight leader did not see him eject. As a result, there was no eye-witness information as to whether Captain

O'Grady survived the explosion and subsequent crash of his plane. Captain O'Grady's parachute deployed and he was in the air nearly twenty-five minutes before finally coming to rest in Serbian-controlled territory. He saw hostile forces mobilizing beneath him as he dropped to the earth and only a fortuitous landing in an opening in a wooded area allowed him to escape capture by his pursuers.

12. Upon hitting the ground, Captain O'Grady acted quickly, following the "evade and survive" techniques he had learned in his training. He had to assume that his comrades did not know he was alive, and broke out his radio hoping to contact them, but was not successful. As Serbian and para-military units combed the countryside for him, Captain O'Grady used his wits and survival training to elude his would-be captors for six days. At times, Captain O'Grady was forced to lay motionless for hours on end as enemy patrols passed within only a few feet of his position, and when his drinking water ran out, Captain O'Grady drank rainwater and ate insects.

13. Moving mostly at night, Captain O'Grady continued to evade enemy capture, and, using his radio sparingly and largely unsuccessfully, tried to make contact with the outside world. Eventually, on the night of June 7, 1995, he made radio contact with a U.S. fighter jet. Soon after receiving Captain O'Grady's transmission, NATO and U.S. forces assembled a large multinational rescue force, including aircraft, helicopters and gunships to provide covering fire, to rescue O'Grady.

14. Early in the morning on June 8, 1995, Captain O'Grady darted from the protective cover of a Bosnian forest to board a waiting Marine helicopter. Although the retrieval was textbook perfect, on the egress route, the helicopters were fired upon by surface to air missiles, anti-aircraft artillery and light weapon ground fire. The rescuers and Captain O'Grady were still

in substantial peril until the helicopters crossed over the Croatian shore line at the Adriatic Sea where ground fire could no longer reach them.

**C. National Hero.**

15. Captain O'Grady returned home a national hero. For the six days he was missing, the story of the downing of Captain O'Grady's fighter jet over hostile Bosnian territory, and speculation as to his survival, was the dominant news story in the United States and indeed, throughout the world. By the time he returned home, Captain Scott O'Grady was a household name synonymous with American heroism and pride.

16. On June 12, 1995, President Clinton hosted Captain O'Grady, his family, and some of his friends at a White House luncheon prior to attending a Pentagon ceremony in his honor hosted by Secretary of Defense William Perry. Later, O'Grady was awarded the Bronze Star and the Purple Heart.

17. Among the many news conferences and interviews Captain O'Grady gave after his return was an extended interview with the British Broadcasting Company ("BBC"). The BBC used the filmed interviews to create a docu-drama of O'Grady's story.

18. The BBC entitled its Captain O'Grady docu-drama, "Missing in Action". On information and belief, the BBC aired the docu-drama in the United Kingdom for some time after its production in 1996.

**D. O'Grady Publishes Story and Completes Active Duty.**

19. In 1995, Captain O'Grady co-authored a book based on his experience titled Return With Honor. On the paperback version, above the title, in large print, the subtitle reads "An American fighter pilot's heroic tale of survival **behind enemy lines**". He also co-authored a children's book based on his experience entitled, Basher 52, after the call sign for his ill-fated flight. Return With Honor was on the New York Times Bestseller List for six weeks.

20. In February of 2001 Captain O'Grady completed his 12 years of active, and active reserve, military service and entered inactive reserve status.

21. Starting on March 7, 1996 Captain O'Grady began delivering inspirational speeches through the Washington Speakers Bureau. That organization books and presents speakers of the highest caliber and notoriety, including for example, Al Gore, Elizabeth Dole, Bill Bradley, Rudi Giuliani, Dan Rather, Bernard Shaw, George Mitchell and many other famous and well known personalities. Captain O'Grady quickly learned that having been connected with a sensational event was not sufficient to be a successful speaker and that much work and effort, as well as an ability to hold an audience's attention, would be required in order to be a successful speaker. Drawing on his harrowing experience to instill his message of what is really important in life, Captain O'Grady started slowly, but through his skill, sincerity, and willingness to work hard soon became a successful professional speaker.

22. Captain O'Grady's number of appearances has steadily climbed over the last few years. While he delivered numerous speeches in 1996, his hard work, notoriety, goodwill and reputation as a speaker have allowed him to increase his number of speaking appearances significantly over the years. But for the acts of Defendants, demand for O'Grady's speaking appearances would be increased such that he could have commanded significantly higher compensation for his services.

23. Captain O'Grady's acts of heroism earned him the respect and affection of those in the military as well as the American public who recognized his actions as the epitome of honorable and brave conduct in the service of his country. His subsequent efforts to craft and present a positive message, delivered in a professional and interesting way through speaking engagements, served to maintain and rekindle the goodwill and positive feelings regarding his experience. Thus, long after 1995, the American public continued to remember and appreciate

the heroism of the young fighter pilot who had been shot down behind enemy lines in Bosnia and had evaded capture and survived.

24. The events of September 11 caused the country to again pay due respect and honor to those who risk their lives every day in the service of their country. Interest in all things patriotic was understandably elevated to new heights. The media and entertainment industries understood this wave of patriotism and immediately seized upon it as an opportunity to increase profits by supplying the public with entertainment programs that would tie in to the renewed American spirit.

25. A little over a month after September 11, Fox Television Studios sent Captain O'Grady a letter regarding the value of his story and how the American people would react to a film based on it:

On behalf of my company, I would like to express sincere interest in developing your life story into an original film for television. Aside from the remarkable bravery you – and those who brought you home - displayed during that difficult week, we feel this is a story the American audience will embrace.

At that time, Captain O'Grady was the owner of all rights to develop a movie based on his story. Captain O'Grady attempted to follow up on the inquiry from Fox Television Studios, but, for reasons not clear to him at that time, no serious negotiations ever occurred.

**E. Discovery Channel Purportedly Obtains Documentary-Drama Rights to O'Grady Story.**

26. Upon information and belief, sometime in the '97-'98 timeframe, unknown to Captain O'Grady, the Discovery Channel purportedly purchased the rights to the BBC's O'Grady docu-drama. Discovery, without the knowledge or consent of O'Grady, renamed the docu-drama, changing the title from "Missing in Action", to "Behind Enemy Lines: The Scott O'Grady Story". On information and belief, Discovery aired the docu-drama numerous times

each year from 1997-8 through 2001, reaching a potential viewing audience of millions. On occasion O'Grady would hear from various persons that "his show" was being played again.

27. Discovery never obtained, nor did it seek from O'Grady, his permission to show the docu-drama, "Behind Enemy Lines: The Scott O'Grady Story".

**F. Fox Produces "Behind Enemy Lines" a Film Based on Captain O'Grady's Story and Commercially Exploits his Identity Without O'Grady's Knowledge or Approval.**

28. On information and belief, sometime in 1998-9, Fox began development of a movie based on Captain O'Grady's story, although it was not an accurate account of the details of his experience. Like Captain O'Grady's ordeal, the Fox movie recounts the story of an American fighter pilot who, while flying a mission during the Bosnian conflict, is shot down over enemy territory and, for nearly a week, utilizes his survival skills to evade capture before finally being recovered by Marines in a daring daylight rescue mission. Captain O'Grady is the only pilot that had that experience and has come to be identified as that person.

29. Fox based its film on Captain O'Grady's story in order to obtain the benefit of associating its film with the goodwill and notoriety of Captain O'Grady's identity, although not accurately recounting the details of his experience. All the defining elements of Captain O'Grady's heroic experience which captured the hearts and emotions of the American public were incorporated, while leaving out facts, names and events which would explicitly reference Captain O'Grady. Apparently, Fox's initial plan was to sell back to the American people the goodwill and feelings associated with Captain O'Grady's actions and identity without actually using his name or explicitly acknowledging that the movie was based on his heroism.

30. Thus, in the Fox movie, as in Captain O'Grady's real-life experience, an American fighter pilot is shot down by a surface to air missile while on a peace keeping mission over Bosnia. In both, the pilot ejects from an exploding aircraft floating down in broad daylight



behind enemy lines. In both, the pilot hides from armed Bosnian Serbs sent to search for him. In both, a number of days pass during which the lead character must evade the enemy. In both, radio communications between the pilot and rescuers play an important role. In both, Marine helicopters launch off a U.S. Navy ship in the Mediterranean to come to rescue him in daylight. In both the helicopters are fired upon by the enemy as they carry the pilot to safety. While the script of the Fox movie is not Captain O'Grady's actual story, the lead character in the movie clearly plays a role associated by the public with Captain O'Grady's identity.

31. Fox, recognizing the significant amount of goodwill and value that had accrued in Captain O'Grady's identity over the years, and likely feeling that it had already been successful in creating a film based on Captain O'Grady's ordeal without having to pay him a penny for his story or publicity rights, began to conceive of additional means in which it could commercially exploit Captain O'Grady's identity to further promote and enhance the value of its film, again, without having to pay him for such right. In other words, Fox was looking for additional means to take a "free ride" on the back of an American military hero.

32. Fox saw a prime opportunity to exploit commercially Captain O'Grady's identity without his consent in Discovery's docu-drama title, "Behind Enemy Lines: The Scott O'Grady Story." Discovery's docu-drama had been aired on national television on numerous occasions from 1998 through 2001, and had probably been seen by millions of viewers. Fox knew that Captain O'Grady's identity and goodwill were inextricably intertwined with the Discovery title, "Behind Enemy Lines," and adopted this title as the title of its new movie with the intent of affiliating Captain O'Grady's identity and goodwill with its film and thereby commercially exploiting the same to increase its film's revenues.

33. Fox never obtained, nor did it seek from O'Grady, his permission to produce its movie entitled "BEHIND ENEMY LINES", which was based on O'Grady's story.

**G. Discovery Channel and Fox Misappropriate O'Grady's Name and Likeness**

34. One afternoon, Captain O'Grady received a phone call from a friend who indicated that Discovery's O'Grady docu-drama, "Behind Enemy Lines: The Scott O'Grady Story," was being aired on national television again, and furthermore, was being used in essence as an infomercial to promote Fox's new movie of the same title, "BEHIND ENEMY LINES." The airing of the Fox sponsored O'Grady docu-drama occurred just ten weeks after the horrific events of September 11, 2001, and days before the opening weekend of Fox's new film, "BEHIND ENEMY LINES."

35. Fox's "BEHIND ENEMY LINES" was originally slated for release in early 2002, but with the patriotic sentiment among the American public at an all-time high, along with U.S. military actions then currently underway in Afghanistan, the opening of "BEHIND ENEMY LINES" was moved up to November 30, 2001, in order to ride the wave of this patriotic movement. But Fox wanted a tie to the American patriotism and pride that its fictional derivative of O'Grady's story alone could not provide, and they found it in Captain O'Grady himself, a real-life American hero.

36. In order to associate the name and likeness of Captain O'Grady with its new film "BEHIND ENEMY LINES" firmly in the minds of consumers, Fox, on information and belief, struck a deal with Discovery to sponsor the airing of the O'Grady docu-drama of the same title to promote the release of its new film in which Fox would be the primary advertiser. Discovery was obviously aware that its O'Grady docu-drama and the Fox film had confusingly similar titles and knew that Fox's sponsorship of the program would lead consumers to believe, incorrectly, that Captain O'Grady was affiliated with, and endorsed the Fox movie. Discovery had its own economic objectives in mind when it struck its deal with Fox and, indeed, aided and abetted Fox in its deception upon the American public.

37. Defendants knew that the association of Captain O'Grady's name and likeness with Fox's new film "BEHIND ENEMY LINES" would be further perpetuated and enhanced through the sponsorship and airing of advertisements for the film during the O'Grady docu-drama of the same title, but this was not enough for Fox. In addition, Fox produced special advertisements that were shown for "BEHIND ENEMY LINES" on the O'Grady docu-drama in the same format as the docu-drama itself. Fox's intent in this regard was to so intertwine the O'Grady docu-drama and its advertisements for "BEHIND ENEMY LINES" that consumers would be convinced that Captain O'Grady was affiliated with and endorsed Fox's new film.

38. The O'Grady docu-drama format comprised interview segments of Captain O'Grady in uniform, and other participants in the events, recounting O'Grady's heroic acts, intermittently cutting to film clips of reenactments of the story. Fox used the same format for its "BEHIND ENEMY LINES" advertisements appearing on its sponsored airing of the O'Grady docu-drama. The Fox format comprised interview segments of the primary actors, Gene Hackman and Owen Wilson, in military uniforms, discussing the movie's story line, intermittently cutting away to film clips of the movie. Fox even conducted some of its interviews of the uniformed actors on board an aircraft carrier placing those ads in the portion of the docu-drama which show Captain O'Grady landing in a helicopter on the deck of an aircraft carrier after his rescue.

39. Fox's "BEHIND ENEMY LINES" advertisements were shown quite frequently between segments of its sponsored airing of the O'Grady docu-drama. Fox's identically formatted ads were so inextricably intertwined with the O'Grady docu-drama that, by the end of the airing of the program, any reasonable person would have been convinced that Captain O'Grady endorsed the Fox film and that he had authorized Fox to exploit commercially his name, likeness and identity in connection with the promotion of the film, which is false.

40. These further acts of Defendants' misappropriation of Captain O'Grady's name, likeness and identity through the airing of the Fox sponsored O'Grady docu-drama occurred on November 28, 2001, just two days prior to Fox's release of "BEHIND ENEMY LINES" in theatres nationwide. A big "first week" is critically important to a movie's success, and the value Fox gained by affiliating Captain O'Grady's name, likeness and identity with its movie significantly enhanced its earnings.

41. After being made aware of the airing of the Fox sponsored O'Grady docu-drama, Captain O'Grady felt wronged and knew that his right to associate his name, likeness and identity to a movie, or other related work, of his choosing had been foreclosed by Fox, or at minimum, significantly damaged. The time, money and effort that would be required to undo what Fox had accomplished in misappropriating his good name was beyond Captain O'Grady's ability, or anyone else's, to remedy – the commercial value of Captain O'Grady's name and identity had been irreparably damaged. In addition, the aforementioned acts of the Defendants caused, and continue to cause Captain O'Grady to suffer humiliation, embarrassment, frustration and general mental anguish, given his unwanted affiliation with the Fox movie and the daunting task of fighting against a major Hollywood motion picture company.

42. Captain O'Grady was also troubled that the "hero" in the Fox movie used foul language, was portrayed as a "hot dog" type pilot, and disobeyed orders, unlike O'Grady. Because of Fox's success in convincing the public that Captain O'Grady was affiliated with, and had endorsed Fox's "BEHIND ENEMY LINES," the portrayal of Fox's "hero" in this manner further damaged the value and goodwill of Captain O'Grady's name, likeness and identity. As a motivational speaker and author of a children's book about his experience, he now feels obliged to distinguish himself from Fox's "hot dog" pilot because the lead character in that film is hardly

a “role model” for youngsters and does not reflect Captain O’Grady’s character, including his faith and religious beliefs.

43. Fox, on the other hand, enjoyed great success at the box office with its movie “BEHIND ENEMY LINES”. On information and belief the movie has grossed more than 90 million dollars since its release. At one point it was second only to “Harry Potter” in box office receipts.

44. In February, 2002, Fox Home Entertainment contacted Captain O’Grady to ask him to participate in the publicity events in support of the release of the movie on DVD and home video. Fox explicitly admitted that it sought his assistance because the movie was “based on” Captain O’Grady’s book “Return With Honor”. Later, Fox again sought O’Grady’s assistance stating, “We would be absolutely honored to work with you on this project, since the film was based upon your unbelievable true story and heroics, and you could offer a very true and real perspective to the film.” Having reaped millions at the box office by trading off the extraordinary goodwill and feelings of the American people for a real military hero, Fox offered Captain O’Grady a meager amount of money as a “participation fee”.

#### **IV. CAUSES OF ACTION**

##### **COUNT ONE: Invasion Of Privacy Through The Misappropriation Of Plaintiff’s Name, Likeness And Identity**

45. Captain O’Grady repeats and realleges the allegations of Paragraphs 1-44 as if fully set forth herein. The foregoing acts of Defendants constitute an appropriation of O’Grady’s name, likeness and identity, to which O’Grady has an exclusive right, for the Defendants’ own commercial use and benefit, without the consent of O’Grady.

46. As a direct and proximate result of the Defendants' unjustified and wrongful misappropriation, Captain O'Grady has incurred the loss of his exclusive right to control the commercial exploitation of his name, likeness and identity, and has suffered irreparable damage to the commercial value thereof. Defendants have been unjustly enriched in that their unauthorized use of O'Grady's name, likeness and identity, and the goodwill and value associated therewith, has promoted and enhanced the value of the business activities of the Defendants by serving as an approval, affiliation and endorsement of these activities. In this connection, O'Grady will show that the commercial value of his endorsement, had it been sold on the open market for the use to which the Defendants put it, is far in excess of the minimum jurisdictional limits of the Court, and that O'Grady is entitled to recover the amount by which the Defendants have been unjustly enriched, including profits realized by the Defendants.

47. As a further result of Defendants' misappropriation of Captain O'Grady's name, likeness and identity, and Defendants' communication of such a false affiliation and endorsement of Defendants' business activities to the public, O'Grady has suffered humiliation, embarrassment, frustration and general mental anguish, and in all reasonable likelihood he will continue to do so for a long time in the future, and is entitled to damages as a result thereof.

48. As a further result of Defendants' misappropriation of Captain O'Grady's name, likeness, and identity and Defendants' communication of such a false affiliation and endorsement of Defendants' business activities to the public, O'Grady has been damaged in that his exclusive right to control the commercial exploitation of his identity, and affiliate with and endorse business activities of his choosing, has been misappropriated, resulting in permanent damage to the commercial value of O'Grady's name, likeness and identity, and lost business opportunities pertaining thereto.

49. The aforementioned acts of the Defendants were committed willfully with the deliberate purpose of appropriating and trading upon the goodwill and reputation associated with Captain O'Grady's name, likeness and identity, without compensation to, or consent from, O'Grady. Consequently, in addition to all other available damages, Captain O'Grady also seeks an award of exemplary damages.

**COUNT TWO:**  
**Violation of The Lanham Act:**  
**False Representations, False Advertising.**

50. Captain O'Grady repeats and realleges the allegations of Paragraphs 1-44 as if fully set forth herein.

51. The foregoing activities of the Defendants constitute the unauthorized use of Captain O'Grady's name, likeness and identity for commercial purposes, and the use of false or misleading representations of fact for commercial purposes concerning Captain O'Grady's name likeness and identity, which have caused, and are likely to continue to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of O'Grady with the Defendants, or as to the origin, sponsorship or approval of the Defendants' goods, services, or commercial activities, by O'Grady, in violation of 15 U.S.C. § 1125(a)(1)(A).

52. The foregoing activities of Defendants also constitute the unauthorized use of Captain O'Grady's name, likeness and identity in commercial advertising or promotion, and the use of false or misleading representations of fact in commercial advertising or promotion concerning Captain O'Grady's name, likeness and identity, which have misrepresented, and are likely to continue to misrepresent the nature, characteristics or qualities of Defendants' goods, services, or commercial activities, in violation of 15 U.S.C. § 1125(a)(1)(B).

53. Such wrongful acts by the Defendants have caused, and are likely to continue to cause, Captain O'Grady to incur substantial damages. O'Grady seeks recovery from the

Defendants of all amounts it is entitled to under 15 U.S.C. § 1117(a), including without limitation: (1) Defendants' profits related to their unauthorized, and false and misleading commercial use of O'Grady's name, likeness and identity ; (2) all damages sustained by O'Grady; (3) treble damages; (4) the costs of the action; (5) reasonable attorney fees; and (6) an additional amount that the Court considers just.

**COUNT THREE:**  
**Common Law Unfair Competition:**  
**False Advertising/Representation; Unjust Enrichment; and Misappropriation**

54. O'Grady repeats and realleges the allegations of Paragraphs 1-44 as if fully set forth herein.

55. The foregoing acts of Defendants constitute unfair competition, false advertising, unjust enrichment pertaining to, as well as misappropriation of, Captain O'Grady's name, likeness and identity, under Texas common law, in that such acts (1) affirmatively misrepresent, in commercial advertising or promotion, the qualities or characteristics of the Defendants goods, services or business activities and have, and are likely to continue to result in confusion as to source, sponsorship, affiliation, or approval of such goods, services or business activities; (2) further constitute misappropriation of O'Grady's name, likeness and identity for commercial purposes, all to the injury of O'Grady's exclusive rights therein, including substantial damage to the goodwill and reputation associated therewith; and (3) show that Defendants have been unjustly enriched in that their unauthorized use of O'Grady's name likeness and identity, and the goodwill and value associated therewith, has promoted and enhanced the value of the business activities of the Defendants by serving as an approval, affiliation and endorsement of these activities.

56. Captain O'Grady seeks a full accounting and recovery from the Defendants of all damages he is entitled to under Texas common law, including without limitation: (1) all



benefits and profits which Defendants' have unjustly received, including, Defendants' profits related to their unauthorized, false and misleading use of O'Grady's name, likeness and identity, and the value of O'Grady's endorsement, had it been sold on the open market for the use to which the Defendants put it; (2) all damages sustained by O'Grady; (3) exemplary damages; (4) the costs of the action; and (5) an additional amount that the Court considers just.

**COUNT FOUR:**  
**Tortious Interference With Prospective Business Relations**

57. O'Grady repeats and realleges the allegations of Paragraphs 1- 44 as if fully set forth herein.

58. The foregoing acts of Defendants constitute tortious interference with prospective business relations under Texas common law in that such acts were unlawful, fraudulent and committed willfully and intentionally, without justification, resulting in significant damage to Captain O'Grady's prospective business relationships. Accordingly, O'Grady seeks recovery from Defendants for all damages sustained by O'Grady and exemplary damages.

**COUNT FIVE:**  
**Civil Conspiracy:**  
**Conspiracy to Misappropriate Plaintiff's Name, Likeness and Identity and to Commit False Representations, False Advertising, Unfair Competition and Tortious Interference With Prospective Business Relations**

59. O'Grady repeats and realleges the allegations of Paragraphs 1- 44 as if fully set forth herein.

60. The Defendants conspired to commit the foregoing unlawful acts under Texas common law in that such acts show concerted action of the Defendants in furtherance of a common design resulting in significant damage to O'Grady. Accordingly, O'Grady seeks

recovery from Defendants, and each of them, jointly and severally, for all damages sustained by O'Grady, and exemplary damages from Defendants, as permitted by law.

**V.**  
**REQUEST FOR JURY TRIAL**

61. O'Grady hereby requests a jury trial.

**VI.**  
**RELIEF SOUGHT**

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff O'Grady, respectfully requests that Defendants be cited to appear and answer this suit, and prays for judgment that:

A. O'Grady owns the exclusive right to control the commercial exploitation of his name, likeness and identity;

B. Defendants, and each of them, have conspired to misappropriate, and have misappropriated, O'Grady's name, likeness and identity in violation of Texas state law; and that such misappropriation has been willful and wanton, and committed with fraud and malice;

C. Defendants, and each of them, have conspired to infringe, and have infringed, O'Grady's exclusive right to commercially exploit his name, likeness and identity in violation of 15 U.S.C. § 1125(a); and that the acts of Defendants constitute willful infringement under 15 U.S.C. § 1117;

D. Defendants, and each of them, have conspired to compete unfairly against O'Grady, and have unfairly competed against O'Grady, through acts consisting of misappropriation of O'Grady's name, likeness and identity, false advertising and false representation in violation of Texas state law; and that such unfair competition has been willful and wanton, and committed with fraud and malice;

E. Defendants, and each of them, have conspired to commit tortious interference with prospective business relations, and have committed tortious interference with prospective business

relations, in violation of Texas state law; and that such tortious interference has been willful and wanton, and committed with fraud and malice;

F. Defendants, and each of them, have unjustly enriched themselves in violation of Texas state law;

G. Defendants' intentional and unlawful acts have significantly damaged the value associated with O'Grady's name, likeness and identity under Texas state law and 15 U.S.C. § 1125(a);

H. Defendants' intentional and unlawful acts have caused O'Grady to suffer, and will likely cause O'Grady to continue to suffer for a long time in the future, humiliation, embarrassment, frustration and general mental anguish under Texas state law;

I. Defendants, and each of them, be ordered to pay O'Grady damages for violations of O'Grady's exclusive right to commercially exploit his name, likeness and identity under Texas state law; and that the maximum exemplary damages be awarded O'Grady under Texas state law, as to each Defendant, on the grounds that Defendants' acts have been willful and wanton, and committed with malice and fraud;

J. Defendants, and each of them, be ordered to pay O'Grady damages for violations of O'Grady's exclusive right to commercially exploit his name, likeness and identity under 15 U.S.C. 1125(a), and to recover from Defendants, and each of them, all amounts to which O'Grady is entitled to under 15 U.S.C. § 1117(a), including without limitation: (1) Defendants' profits; (2) all damages sustained by O'Grady; (3) treble damages, on the grounds that Defendants' acts have been willful and wanton; (4) the costs of the action; (5) reasonable attorney fees; and (5) an additional amount that the Court considers just;

K. Defendants, and each of them, be ordered to pay O'Grady damages for unfair competition, false advertising, false representation and unjust enrichment under Texas state law; and

that the maximum exemplary damages be awarded O'Grady under Texas state law, as to each Defendant, on the grounds that Defendants' acts have been willful and wanton, and committed with malice and fraud;

L. Defendants, and each of them, be ordered to pay O'Grady damages for tortious interference with prospective business relations under Texas state law; and that the maximum exemplary damages be awarded O'Grady under Texas state law, as to each Defendant, on the grounds that Defendants' acts have been willful and wanton, and committed with malice and fraud;

M. Defendants, and each of them, be ordered to pay O'Grady damages for mental anguish caused by Defendants' intentional and unlawful acts under Texas state law; and that the maximum exemplary damages be awarded O'Grady under Texas state law, as to each Defendant, on the grounds that Defendants' acts have been willful and wanton, and committed with malice and fraud;

N. The Court find the Defendants jointly and severally liable for all damages awarded O'Grady, other than exemplary damages, on grounds that the Defendants conspired to commit the acts giving rise such damages;

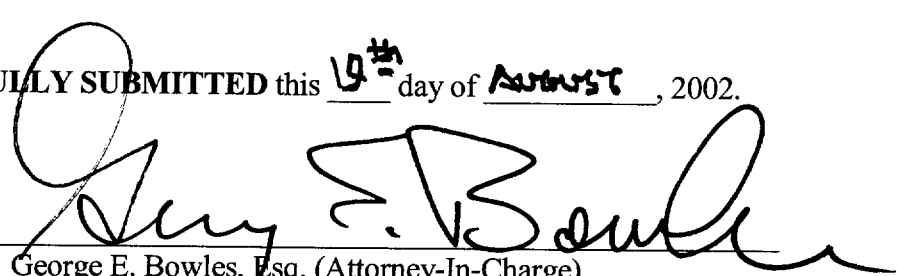
O. Defendants, and each of them, be required to pay O'Grady pre-judgment interest on all amounts awarded, and post-judgment interest, until paid, at the highest lawful rate;

P. Defendants, and each of them, be required to pay O'Grady's costs, disbursements and reasonable attorney's fees, as provided by Texas state law and the Lanham Act; and

Q. O'Grady have such other relief as the Court deems just and equitable.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2002.

By: \_\_\_\_\_

  
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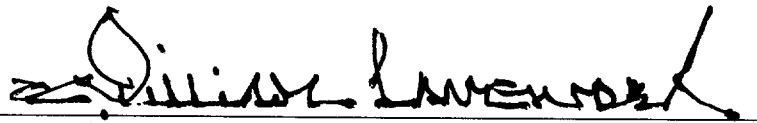
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